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국제학석사학위논문

# **Examining the Operation of the WTO Appellate Body: Focusing on the Composition**

**WTO 상소기구 운영 평가: 상소 위원 구성을  
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**이 하 경**

# **Abstract**

## **Examining the Operation of the WTO Appellate Body : Focusing on the Composition**

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After the establishment in 1995, more than 500 cases were brought to the WTO Appellate Body. The significance of the organization necessitates a test for its operation. Operation of an organization can be tested by various factors. Among those, this paper focus on impartiality and professionalism by looking at the composition of the AB. The impartiality here refers to the independence from the members—governments—of the WTO. The AB sustains those values by articles in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Working Procedures for the AB.

First, upon selecting the sitting Appellate Body Members, they demand broad representation of the Membership of the WTO. Second, the AB is distinct from the dispute settlement in the panel level in that it does not ban a national of the case from serving the case. The paper tested whether such a freedom cause home state advantage. Lastly, the DSB requires the Appellate Body Members to show expertise in the issues dealt in the organization. This paper analyzed whether the history of the AB composition reflected such three requirements mentioned in the DSB and the Working Procedures.

After the analysis, it is found that the AB bears some problems. The composition does not represent the Membership of the WTO broadly and shows domination of some countries. The home state advantage does not distinctively appear and the impartiality seems to be sustained in the AB, yet leaving a room for anxiety due to high proportion of Members serving cases that involve home states. Next, only three out of twenty-seven Members showed expertise in trade remedy which occupies almost half of the cases brought to the AB.

Keywords: WTO Appellate Body, WTO Appellate Body composition, Appellate Body Members, DSU, Expertise of AB Members, home-state advantage

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## List of Abbreviations

<b>AB</b>	Appellate Body
<b>Anti-dumping Agreement</b>	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Understanding on Rules and Procedures Governing the Settlement of Disputes
<b>EU</b>	European Union
<b>GATT 1947</b>	General Agreement on Tariffs and Trade 1947
<b>ICJ</b>	International Court of Justice
<b>ITLOS</b>	International Tribunal for the Law of the Sea
<b>Members</b>	World Trade Organization Appellate Body Members
<b>SCM Agreement</b>	Agreement on Subsidies and Countervailing Measures
<b>WTO</b>	World Trade Organization

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# Chapter I. Introduction

## **1.1. Background and Purpose of the Study**

Existence of an international court is justified with its legitimacy. One of earlier literatures asserts that for an international court, “no attribute is more important than legitimacy [since it] provides courts authority.”<sup>1</sup> And the legitimacy comes from the international court’s independence, impartiality, and expertise on pertinent legal matter. Here, the *judicial independence* refers to “the freedom of judges to decide disputes upon the facts and the law, free of outside influences such as the preferences of powerful states”<sup>2</sup>

Dispute settlement system of the World Trade Organization, especially the Appellate Body is substantially functioning as the world’s trade court although it has never been officially nominated as a court since

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<sup>1</sup> Gibson, G. L., & Caldeira, G. A. (1995). The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice. *American Journal of Political Science*, 39(2), 459-489, p. 460

<sup>2</sup> Dunoff, J. L., & Pollack, M. A. (2017). The Judicial Trilemma. *American Journal of International Law*, Forthcoming; Temple University Legal Studies Research Paper No. 2017-05. Available at SSRN: <https://ssrn.com/abstract=2955172>, p. 1

its service in 1995. However, over 500 disputes brought to the system and 350 rulings issued support that states perceive the dispute settlement system as the troubleshooter for trade disputes.<sup>3</sup>

The creation of the Appellate Body was the major development that distinguished the WTO Dispute Settlement mechanism from that of former General Agreement on Tariffs and Trade (GATT) 1947 system.<sup>4</sup> As a result, the WTO Dispute Settlement system could settle itself as a quasi-world trade court with the establishment of the standing Appellate Body.

The establishment of standing Appellate Body introduced legalism and binding authority to the dispute settlement system, and this explains why the its establishment is often called as a ‘jewel of crown’. The Appellate Body comprises seven persons who hear appeals, make decision, and write Appellate Body Report. While none of the UN documents refer Appellate Body as court or Appellate Body Members as judge, it certainly functions as a quasi-international court for trade issues seeing that it may uphold, modify or reverse the legal findings and conclusions made in the panel level. In addition, as any other judgments made by international courts, the Appellate Body Report shall be unconditionally accepted by the parties

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<sup>3</sup> [www.wto.org](http://www.wto.org)

<sup>4</sup> In fact, the WTO dispute settlement mechanism is a stretch initiated in 1995 from that under the GATT.

to the dispute within 30 days following its circulation to the members according to the DSU Article 17.14.<sup>5</sup> Therefore, seven Members play main role in operating the Appellate Body because they are the subject who produce such a ruling.

With such authority and compulsory implementation of the result, who sits in the Appellate Body is definitely an important issue. Since the WTO dispute settlement system deals with multi-billion dollar impact trade issues brought by states, those seats should be occupied by reliable and qualified persons who pursue common interest for world trade; who are capable of resolving trade-related legal issues with expertise; and who can make impartial decisions. Hence, the evaluation on operation of the Appellate Body, in part, lies on composition of the Appellate Body. From this angle, this thesis focuses on history of AB composition and thereby evaluates its operation. In evaluating the operation of the organization, independence, impartiality and expertise of the composition will be tested owing to the fact that they are important values that sustain the legitimacy of a court.

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<sup>5</sup> According to Shaffer, G., Elsig, M., & Puig, S. (2016), “WTO members have been careful not to refer to the Appellate Body as a court or to its members as judges. Rather, the DSU refers to Appellate Body members as “persons” who comprise “the Appellate Body membership” and who have “demonstrated expertise in law” (Article 17). The Appellate Body members refer to themselves as “members,” and not as judges.”

Rüdiger Wolfrum divided types of a court's legitimacy into three: source-oriented factor, process-oriented factor, and result-oriented factor.<sup>6</sup> First, an international court can justify its authority with the source that is given to the organization at the point of establishment, such as consent to be bound. Process-oriented legitimacy lies in "fair and even-handed procedures and the open-mindedness of judges", while the result-oriented legitimacy relies on the evaluation by the constituents on "how well the international court performs its functions."<sup>7</sup>

Among the legitimacy listed above, legitimacy in this thesis indicates the second type, the process-oriented legitimacy. Impartiality and professionalism of the Appellate Body will be tested by thorough analysis on the composition of the AB Members since the AB sustains those values by devices set in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Working Procedures for the AB. If deficiency in impartiality and expertise is detected in the composition of the AB, such procedural legitimacy is being hurt and it would signify that AB is not being operated well.

In fact, voices of concerns regarding before-mentioned two values

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<sup>6</sup> Röben, V., & Wolfrum, R. (2008). *Legitimacy in international law*. Berlin: Springer, p. 6.

<sup>7</sup> *Ibid.*

in the Appellate Body have been heard since the establishment.

In case of the impartiality, the influence of certain Members on the operation of the Appellate Body has been causing anxiety. Steinberg criticized the DSM in similar context. According to his argument, judicial decision-making in the WTO faces ‘a hard political constraint’ in its action due to some powerful Members such as the United States and EU. These actors are capable of influencing the rulings of the Appellate Body in their interest. At the DSM, which is the focus of this thesis, more powerful actors influence the DSM to their own advantage if you see the record of quasi-judicial lawmaking by the Appellate Body.<sup>8</sup>

Another critical perspective was proposed by Garrett and McCall-Smith. They have found out that the Appellate Body conciliates to more powerful Member States. Therefore, in the short term, Appellate Body decisions become strategic and often political.<sup>9</sup> The AB’s reluctance to strong and unequivocal adverse rulings against powerful WTO members on sensitive trade issues that could impact the domestic politics supports their

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<sup>8</sup> *Ibid.*

<sup>9</sup> Garret, G. & Smith, J. M. (1999). The Politics of the WTO Dispute Settlement, Paper prepared for presentation at the Annual Meeting of the American Political Science Association, Atlanta, GA, September 1-5, 1999, 1-47, p. 44. Retrieved December 22, 2017, from <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.35.408&rep=rep1&type=pdf>

argument.<sup>10</sup>

The influence of the US on appointment of the AB Member is also the source where the voices of concern regarding the legitimacy of the organization are rising. The US blocked the reappointment of Chang Seung-wha, the former AB Member, identifying four cases where he overstepped the authority of the AB. The US representative argued that his actions “raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system.”<sup>11</sup> The international community was alarmed by the US announcement. South Korean delegation denounced the US by stating that “its [US] message is loud and clear: If AB Members make decisions that do not conform to US perspectives, they are not going to be reappointed.”<sup>12</sup> The former and current Appellate Body Members sent a letter to the DSB and expressed a strong warning that such an action would jeopardize the credibility of the

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<sup>10</sup> *Ibid.*

<sup>11</sup> Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva May 23, 2016.

<sup>12</sup> Elsig, M., & Shaffer, G. (2016, June 6). The U.S is causing a major controversy in the World Trade Organization. Here's what's happening. *The Washington Post*. Retrieved December 20, 2017, from [https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?utm\\_term=.17b98ea26882](https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?utm_term=.17b98ea26882)

WTO's dispute settlement mechanism.<sup>13</sup> With the incident threatening the organization's independence, the legitimacy of the Appellate Body were injured.

Besides, controversies with respect to the quality of Appellate Body Members have been rising as well. The critics' point is that the AB recently appointed AB Members who lack legal experience or language proficiency in WTO official language that is necessary for writing a legal document.<sup>14</sup>

In this sense, the operation of the Appellate Body is worth examining in order to add substantial evidence to the criticism.

## **1.2. Structure and Methodology**

The criteria to evaluate the legitimacy of the WTO Appellate Body are drawn out from the articles in the DSU and Working Procedures for Appellate Review. They will be elaborated in the second chapter.

From the third chapter through the fifth chapter, the legitimacy of

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<sup>13</sup> *Ibid.*

<sup>14</sup> Appleton, A. E. (2016). Judging the Judges or Judging the Members?: Pathways and Pitfalls in the Appellate Body Appointment Process. *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics*, 11–31, p. 12

the WTO will be assessed according to three criteria previously mentioned. In the same section, significance of each criteria will be explained in the beginning and literatures will be reviewed to speculate how earlier studies studied broad representation, nationality limit, and expertise of judge of an international court. The analysis of the AB's composition will follow according to the aforementioned criteria. The status quo of the ITLOS and ICJ under the same criteria will be compared with the Appellate Body at the end of each chapter. In the conclusion, some recommendations will be suggested.

Research methodology differs by chapters, but statistical analysis will be the main research methodology. In common, the correspondence of records of composition of the Appellate Body and the rules governing the AB will be tested with the reprocessed raw data from the WTO website. These processed data are arranged in tables and statistics and they will be utilized as evidence to my arguments regarding the conformity of the composition of the AB to the rules in the DSU and Working Procedures for the Appellate Body.

### **1.3 Overview on the Appellate Body**



A simple explanation on the operation and composition of the Appellate Body will help to understand the later parts of the thesis.

### **1.3.1 Authority and Procedure**

The DSU Article 17.6 binds the AB's jurisdiction within the issues of law covered in the panel report and legal interpretations developed by the panel.<sup>15</sup> The AB can uphold, modify or reverse the legal findings and conclusions that have been already concluded in the panel level.<sup>16</sup> Hence, the jurisdiction of the Appellate Body is imposed with more constraints compared to other international courts or the panel level. In order to block contradiction in decisions and to ensure consistency and collegiality, the Members consult with the entire Appellate Body Membership before issuing the ruling.<sup>17</sup>

Once an Appellate Body releases the report, the losing parties have obligation to comply with the AB's final decision within a reasonable period of time. The winning parties have option to request a panel review on the

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<sup>15</sup> DSU Article 17.6

<sup>16</sup> DSU Article 17.13

<sup>17</sup> Van Grassek, C. (2013). *The History and Future of the World Trade Organization*. World Trade Organization, p. 240

compliance of the ruling by the losing parties according to the DSU Article 21.5. Such a panel review can be also appealed in the AB.

### **1.3.2 Selection of a Member**

Understanding how the Appellate Body is composed will important in understanding the dynamics between AB Members, states, and AB. The DSB appoints the AB Members.<sup>18</sup> The procedures follow the paragraph 13 of the DSB's 1995 Decision on the Establishment of the Appellate Body. First the Selection Committee is established. It is composed of the WTO Director-General and chairpersons of the DSB, the General Council, and the Councils for Trade in Goods, Trade in services and TRIPS. The delegations then turn in the names and resumes of their candidates. Then, the Committee carries out interviews with the candidates who were nominated by the delegations. After conducting interviews with all candidates, the Committee puts forward a candidate or candidates to the DSB for appointment. The DSB makes a decision on appointment and the candidates that were sent up to the DSB are usually appointed.<sup>19</sup>

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<sup>18</sup> DSU Article 17.2

<sup>19</sup> Macrory, P., Appleton, A. & Plummer, M. (2007) The World Trade Organization: Legal,

### **1.3.3 Distribution of Members to the Case**

The random distribution of Members to the cases is also important measure to secure impartialness and independence of the AB from states' influence.

Disputes that are filed to the Appellate Body are assigned randomly. Article 6 of the Working Procedures for Appellate Review articulates that they are distributed “on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.”<sup>20</sup> Said El Naggar, the former Appellate Body Member in the first batch, devised a method that could actualize the random assignment. The seven Members of the Appellate Body will be pick a chip that has number written on it. That number becomes their identification. And then, the numbers will be assigned to cases through mathematical system. By using this method, the distribution of the case cannot be disclosed to Appellate Body Members in

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Economic and Political Analysis. Geneva: Springer, p. 1287

<sup>20</sup> Working Procedures for Appellate Review, Article 6.2

advance.<sup>21</sup>

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<sup>21</sup> *Supra* note 14, p. 241

## Chapter II. Criteria for Evaluation

### 2.1 Criteria

The standards for evaluation are derived from the rules concerning the composition of the Appellate Body. Three rules govern composition of the Appellate Body: DSU, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Working Procedures for Appellate Review. Among them, this thesis will focus on Article 17 paragraph 3 of the DSU and Article 6 paragraph 2 of the Working Procedures for Appellate Review.

#### DSU

##### Article 17

3 . The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the *subject matter of the covered agreements generally*. They shall be unaffiliated with any government. The Appellate Body membership shall be *broadly representative of membership in the*

WTO...

## **Working Procedure for Appellate Review**

### Article 6

2. The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve *regardless of their national origin*.

From the above-mentioned articles, I drew out three criteria for evaluation. Pursuant to the Article 17 paragraph 1 and 3, the Appellate body members shall be broadly representative of membership in the WTO; Members can serve the case regardless of their nationality; persons comprising the AB should demonstrate expertise in law, international trade and the subject matter of the covered agreements generally.

Therefore, three aspects will be checked: whether the composition of the Appellate Body broadly represents the membership in the WTO; whether lift of ban on nationality undermine impartiality of the AB; whether the AB members have expertise in covered agreements (trade remedy).

## **2.2 Significance**

### **2.2.1 Broad Representation**

The first criteria broad representation bears significance in two ways, one for qualified ruling that reflects legal diversity of the world and the other for preventing uneven playing field in the AB.

David Unterhalter, the former AB Member, singles out legal diversity as the reason why the AB composition should reflect broad representation of the WTO Membership in his farewell speech.<sup>22</sup>

“It (The composition of the Appellate Body) does not represent the membership, but it must reflect the diversity that makes up the membership. It has always been a strength of the Appellate Body that its Members come from very different legal traditions, and very different societies. These perspectives are brought to bear upon a common purpose: the resolution of disputes under the discipline of WTO law.

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<sup>22</sup> David Unterhalter is the former Appellate Body Member who served two terms from 2006 to 2013.

The decisions of the Appellate Body yield singular answers. The decision-makers are diverse. The result is the richer for it.”<sup>23</sup>

As the speech iterates, broad representation of an international court like the Appellate Body is significant since the diversity achieved through it enriches jurisprudence of the Appellate Body. Also, Dannenbaum (2012) emphasizes “both regional and legal systemic diversity [since they] provide international courts with genuine value”.<sup>24</sup> He cites Professor Georges Abi-Saab in explaining the importance of diversity<sup>25</sup>:

“Legal-systemic diversity helps to preserve “the unicity and intellectual autonomy of international law, which should not be identified with any single legal system or tradition.”<sup>26</sup>

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<sup>23</sup> Farewell Ceremony of Appellate Body Member David Unterhalter, [https://www.wto.org/english/tratop\\_e/dispu\\_e/unterhalterspeech\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm)

<sup>24</sup> Dannenbaum, T. (2012). Nationality and the International Judge : The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed. *Cornell International Law Journal*, 45(1), 77–184. p.176

<sup>25</sup> Georges Abi-Saab is the former Appellate Body Member who served two terms, from 2000 to 2008.

<sup>26</sup> Georges Abi-Saab, Presentation: Ensuring the Best Bench— Ways of Selecting Judges, in Peck, C. & Lee. R. (1997). Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court, the Peace Palace. The Hague, Boston and London: Martinus Nijhoff Publishers,



The second reason that the AB should reflect regional diversity in its composition is to prevent uneven playing field for some states. According to logic of Dannenbaum (2012), when judges with one legal tradition fills up an international court, some countries feels easier to access, while the court becomes less reachable to others.<sup>27</sup> In fact, the WTO Dispute Settlement Mechanism shows skewed utilization by some of the WTO members.

The diversity issue hence extends to impartiality and independence of the Appellate Body from the parties, which directly relate to the legitimacy of the institution. If the Appellate Body fails to represent the membership of the WTO and function as a gentlemen's club by few states, trust will be worn away and states whose legal tradition is not reflected by the AB will avoid bringing the case to the WTO.

### **2.2.2 Influence of Nationality of a Member**

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p. 169

<sup>27</sup> *Supra* note 20.

Table 1 compares contradictory rules for the panel and the AB on nationality of a Member taking charge of the case.

**Table 1.** Comparison of Rule between Panel and the AB

Appellate Body	Panel
Working Procedures for the Appellate Review, Article 6	DSU, Article 8
(2) The Members constituting a division shall be selected on <i>the basis of rotation</i> , while taking into account the principles of random selection, unpredictability and opportunity for all Members to <i>serve regardless of their national origin</i> .	3. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 <i>shall not serve on a panel</i> concerned with that dispute, unless the parties to the dispute agree otherwise.

While the panel bans a national or even a third party national from parties to the dispute from serving the panel, the Appellate Body rejected such a nationality limit and takes a cosmopolitan approach allowing Members to serve the cases detached from the nationality of parties to the dispute.

Yet, contrary to the cosmopolitan approach taken by the AB most of

the traditional literatures consider judges as “inherently and irreversibly partial to, and perhaps dependent on, their respective countries of origin”.<sup>28</sup> The ICJ and the ITLOS also have this assumption in the basis of their statute.

The WTO Appellate Body receives similar criticism. According to Elsig, M., & Pollack, M. A. (2014), WTO AB appointment process is politicized. The Member states oppose a candidate whose past experience indicates that he or she does not fit their preference.<sup>29</sup>

In this sense, influence of the nationality of an AB Member to the result of the case is an issue that needs to be addressed. The result can either prove that international Judges are unavoidably preferential to their home states or show that there is a considerable detachment between nationality and a Member’s decision.

### **2.2.3 Expertise in Trade Remedy**

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<sup>28</sup> *Supra* note 20, p. 78

<sup>29</sup> Elsig, M., & Pollack, M. A. (2014). Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization. *European Journal of International Relations* , 20(2), 391-415.

The legitimacy of a court also lies in the quality and competence of judges.

According to the DSU Article 17.3, an AB Member should demonstrate expertise in law, international trade and the subject matter of the covered agreements generally. Among them this thesis will focus on judge's expertise on trade remedy. The reasons are high rate of trade remedy cases addressed in the Appellate Body and contentiousness.

As of November, 2017, 132 Appellate Reports have been adopted. Among 132 Appellate Review, 65 cases concerned trade remedy agreements.<sup>30</sup> The proportion of trade remedy cases reached 49% of the total disputes as of November 2017, proving that trade remedy is important qualification for an AB Member.

Second reason that third part of the thesis treats trade remedy issue out of many other international agreements that are addressed to the AB is due to the contentiousness of the issue. Especially, the United States is continuously clashing with the AB on trade remedy issues. The US was repeatedly and consistently accused in violation of the anti-dumping agreement. Moreover, the past safeguard measures by the US has never been

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<sup>30</sup> There are three WTO agreements regarding trade remedy: Agreement on Subsidies and Countervailing Measures (SCM), Anti-dumping Agreement, and The Agreement on Safeguards.

found to be WTO-consistent as of 2014 and subsidies for products concerning steel, cotton, lumber and aircraft were caught to be against WTO subsidies agreement. Some literatures written in the US spot the AB for culprit of destroying US industries.<sup>31</sup>

In this context, the importance and necessity for a Member who has profound knowledge and experience in trade remedy have continuously grown.

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<sup>31</sup> For example, “How the WTO Undermines U.S. Trade Remedy Enforcement” written by Stewart, P. & Drake, E. (2017).

## **Chapter III. The First Criteria: Broad Representation**

In this part, the DSU article related to broad representation will be identified and interpreted, and with the interpretation the composition of the institution will be assessed.

### **3.1 Related Rule and Interpretation**

The Article 17.3 of the DSU requires rather vague standard for the composition of the Appellate Body.

#### **DSU 17.3**

The Appellate Body membership shall *be broadly representative of membership in the WTO*.

Here, the interpretation of the ‘broadly represent’ is crucial in order to evaluate whether the AB composition reflects the entire membership of

the WTO. Yet, the DSU provides no further explanation or criteria that is necessary to interpret ‘broadly representative of the WTO membership’. Hence the scope of broad remains quite ambiguous. Young and Cullen (2010) faced the same problem of interpreting ‘broadly representative’ from the Basic Law of Hong Kong. They interpreted ‘broad’ as less than ‘exactly’ and ‘absolutely’.<sup>32</sup> The dictionary defines broadly as ‘in general and without considering minor details.’<sup>33</sup>

Taking earlier study and definition into account I have set two minimum standards for broad representation. 1) No region must be excluded from the Appellate Body Member composition<sup>34</sup> 2) In the region, certain countries should not dominate the position in the AB.

The unit of analysis in this study is region in testing ‘broad’. This is because the simplest way to check broad distribution of the seat to the worldwide membership is to see whether the regions are evenly represented. The WTO classifies the member states into seven geographical regions: North America, South/Central America, Europe, Commonwealth of

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<sup>32</sup> Young, S. N. M., & Cullen, R. (2010). *Electing Hong Kong's Chief Executive*. Hong Kong University Press. p. 52

<sup>33</sup> Broadly. (2017). In *Oxford*. Retrieved from <https://en.oxforddictionaries.com/definition/broadly>

<sup>34</sup> WTO divides the world into seven regions: North America, South/Central America, Europe, Commonwealth of Independent States, Africa, Middle East, and Asia

Independent States, Africa, Middle East, and Asia.

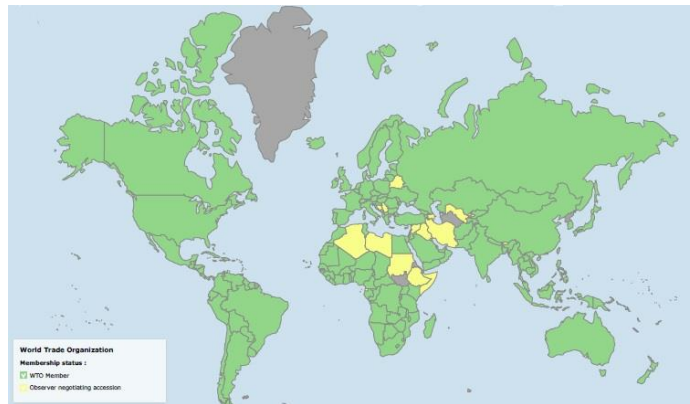
### **3.2 Two Trends regarding Representation in the Appellate Body**

When broad representation of the Appellate Body Members for past 22 years were analyzed with the criteria laid out above, two trends were visible. Commonwealth of Independent States and Middle East never had a seat in the Appellate Body; and certain countries repeatedly represented the region.

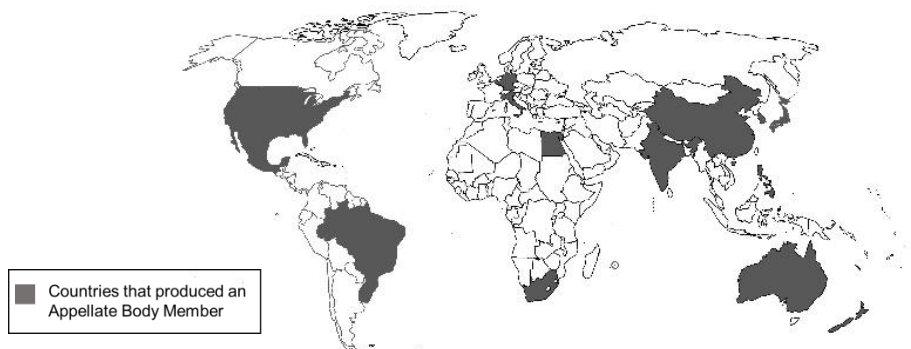


### 3.2.1. The First Trend: Exclusion of CIS and Middle East

**Figure 1.** Countries that are parties to the WTO<sup>35</sup>



**Figure 2.** Countries that have produced an Appellate Body Member



<sup>35</sup> Retrieved from [https://www.wto.org/english/thewto\\_e/countries\\_e/org6\\_map\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm), 20171110

Thus far, the WTO holds 164 Countries as the Member states. Their regional composition is laid out in the Figure 3.

**Figure 3.** WTO Membership categorized by regions

<b>Regions</b>	<b>Number</b>
Africa	49
Asia	30
Middle East	8
CIS	6
Central and South America	30
North America	2
Europe	39
SUM	164

The DSB fixated five regions among seven as the producer of Appellate Body members. For the past 22 years, Appellate Body Members' nationality belonged to North America, Central and South America, Asia (especially from South/West Asia, East Asia, and Oceania), Europe, and Africa.<sup>36</sup> The figure 2 visualizes the nationalities of Appellate Body

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<sup>36</sup> According to the WTO website, "the European Union (until 30 November 2009 known officially in the WTO as the European Communities for legal reasons) has been a WTO member since 1 January 1995. The 28 member States of the EU are also WTO members in their own right. The EU is a single customs union with a single trade policy and tariff. The European Commission — the EU's executive arm — speaks for all EU member States at almost all WTO meetings." Therefore, EU is considered as one unit in this paper.

Members. Although the WTO holds 164 member states world-wide as shown in the Figure 1, only a part of the continents are colored in the Figure 2 while others remain white. Among them, there are certain regions explicitly remain uncolored: Commonwealth of Independent States (CIS) and the Middle East. The exclusion of these regions threatens the Appellate Body's broad representation of the WTO membership.

The continuous appointment of persons from five regions leaves room for questions. What is the standard of selecting these five regions among seven regions? Does the exclusion of the CIS and the Middle East result from lack of membership, small trade volume, or passive participation?

First, the CIS and Middle East show high rate of WTO membership as any other continents. Among CIS states, Armenia, Georgia, Tajikistan, Kazakhstan, Russian Federation, Ukraine, and Kyrgyz Republic are the members of the WTO. Azerbaijan, Belarus and Uzbekistan are observer governments while Turkmenistan remains as the only country which is not a member in the region.<sup>37</sup> In case of Middle East, Israel, Jordan, Saudi Arabia, Yemen, Oman, United Arab Emirates, Kuwait, Qatar, Bahrain are the members while Syria, Iraq, Iran, Lebanese Republic are observer states negotiating accession. Except for Turkmenistan, all states from the CIS and

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<sup>37</sup> Countries that are negotiating the accession to the WTO are called observer states.

Middle East are either members of the WTO or in the process of accession. However, their posts in the AB have not yet been provided for 22 years. Therefore, the lack of membership to the WTO cannot be the reason for exclusion.

Next, both regions occupy trade volume that does not justify the exclusion. According to the WTO 2015 Regional Merchandise Export Profiles, each region holds following percent in the export trade volume.<sup>38</sup>

**Table 2.** Export Trade Volume by Region 2015<sup>39</sup>

Region		Percentage of Trade Volume
1	Europe	37
2	Asia	29
3	North America	19
4	Middle East	4
5	South and Central America	4
6	Africa	3
7	CIS	2

Source: [www.wto.org](http://www.wto.org)

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<sup>38</sup> See Table 2.

<sup>39</sup> 2015 World and Regional Merchandise Export Profiles, WTO

Compared to Europe, Asia, and North America which have large share in the world trade volume, Middle East and the CIS have smaller voice. However, putting aside the CIS which has the least share in the world trade, South and Central America and Africa retained position in the Appellate Body since the establishment. They have similar share of trade volume with the Middle East, which has not been represented in the Appellate Body. There may be other political or social reasons that Middle East countries did not take position in the Appellate Body. However, the trade volume cannot be an excuse for the exclusion of the Middle East.

Finally, the exclusion may have occurred due to the passive participation in the WTO by two regions. This is the most potent cause for the exclusion. According to Van Grassek's statistics, 245 people served as dispute settlement panelists from 1995 to 2012. These individuals came from 61 different countries but none from Middle East and CIS countries except for Israel.<sup>40</sup> However, the participation of the CIS and Middle East is on the increase. With the Ukraine's action of bringing Armenia to the Dispute Settlement system of the WTO in July 2010, the CIS began to participate in the mechanism. The Middle East also began to play a part in

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<sup>40</sup> *Supra* note 20, p. 258

the WTO Dispute Settlement mechanism by Qatar bringing the United Arab Emirates before the WTO Dispute Settlement Mechanism.

In fact, among 14 disputes that were newly brought to the Dispute Settlement Mechanism in 2017, half of the case were brought by the countries that belong to the CIS or Middle East.<sup>41</sup>

**Table 3.** Cases brought to the WTO Dispute Settlement Mechanism in 2017

	Dispute Number	Date	Complainant	Respondent
1	DS 519	12-Jan-2017	United States	China
2	DS 520	18-Jan-2017	United States	Canada
3	DS 521	27-Jan-2017	Russian Federation	European Union
4	DS 522	8-Feb-2017	Brazil	Canada
5	DS 523	8-Mar-2017	Turkey	United States
6	DS 524	8-Mar-2017	Mexico	Costa Rica
7	DS 525	19-May-2017	Russian Federation	Ukraine
8	DS 526	31-Jul-2017	Qatar	United Arab Emirates
9	DS 527	31-Jul-2017	Qatar	Kingdom of Bahrain
10	DS 528	31-Jul-2017	Qatar	Kingdom of Saudi Arabia
11	DS 529	1-Sep-2017	Indonesia	Australia
12	DS 530	19-Sep-2017	Ukraine	Kazakhstan

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<sup>41</sup> See Table 3.

13	DS 531	28-Sep-2017	United States	Canada
14	DS 532	13-Oct-2017	Ukraine	Russian Federation

As the participation of the excluded region grow in the Dispute Settlement mechanism, broad representation of the WTO would become a more important and disputed issue than now. Reflection of Members from diverse legal tradition and nationality will lead to credibility and acceptability of the system.

The reason for the exclusion is difficult to detect. Nevertheless, it cannot be denied that exclusion of the CIS and the Middle East does not comply with the DSU Article 17.3. Again there were two standards to assess the broad representation of the Appellate Body Membership: 1) No region must be excluded from the Appellate Body Member composition 2) In the region, certain country should not dictate the position.

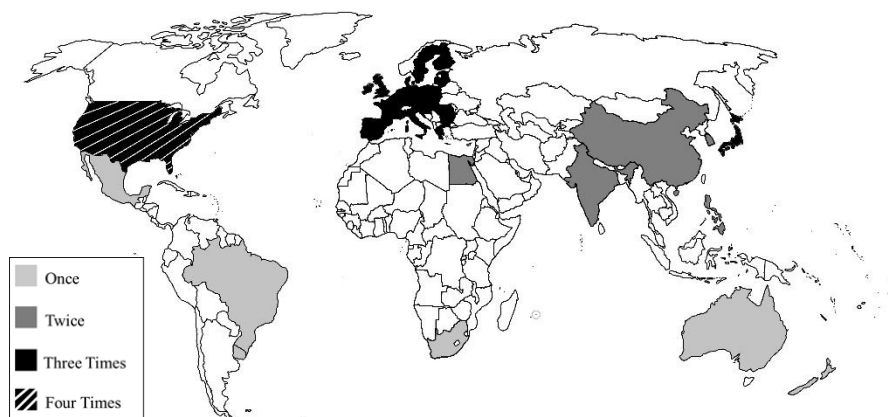
Due to the exclusion of the two regions, the composition of the AB did not meet the first criteria. As a result, the Appellate Body failed to represent the WTO membership broadly even under the minimum standard.

### 3.2.2. The Second Trend: Quasi-permanent Seat for Certain States

The second visible trend is that certain countries dominate the representation of respective region.

Figure 4 visualizes the number of times a country has occupied the seat in the Appellate Body. The darker the color, the more times a country has occupied Appellate Body Member position. The EU is counted as one unit. For the past 22 years, four Members from the US has been elected in order to represent North America and Japan has taken the seat in the Appellate Body for three times. The EU took seat in the AB for three times as well. Members from India, Philippines, China, Korea, and Egypt produced an Appellate Body Member for two times.

**Figure 4.** The number of times a country has occupied seat in the AB





Chances were given to the countries discriminatively. For four times, Canada failed to attain a position in the AB to represent North America. Also a seat in the Appellate Body is exclusive to Philippines and India in South/West Asia. Moreover, Appleton (2016) expressed a concern that China may be in the course of having a permanent seat in the Appellate Body.<sup>42</sup> Eastern and Northern European countries did not yet have seat in the AB while wealthier countries in the Western Europe served the AB for three terms consecutively.

The Appellate Body composition fails to meet minimum standard of broad representation due to some quasi-permanent seat for some country. However, considering the short history of Appellate Body compared to other classic courts, chances to correct the composition still remains high in the future.

Next, the Appellate Body faces overrepresentation of Asia and especially East Asia. Table 4 organized nationalities and regions of Appellate Body Members for the past 22 years. They are divided into five

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<sup>42</sup> *Supra* note 14, p. 12

batches according to their starting year of the term.<sup>43</sup>

**Table 4.** Nationality and Region of Appellate Body Members

First Batch			
Term	Members	Nationality	Region
1995-2000	James Bacchus	United States	North America
1995-2000	Christopher Beeby	New Zealand	Asia
1995-2001	Claus-Dieter Ehlermann	Germany	Europe
1995-2000	Said El-Naggar	Egypt	Africa
1995-2001	Florentino Feliciano	Philippines	Asia
1995-2001	Julio Lacarte-Muró	Uruguay	Central and South America
1995-2000	Mitsuo Matsushita	Japan	Asia
Second Batch			
Term	Members	Nationality	Region
2000-2008	Georges Michel Abi-Saab	Egypt	Africa
2000-2008	Arumugamangalam V. Ganesan	India	Asia
2000-2007	Yasuhei Taniguchi	Japan	Asia
2001-2009	Luiz Olavo Baptista	Brazil	Central and South America

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<sup>43</sup> The Members of the first batch (James Bacchus through Matsushita) has started to serve Appellate Body simultaneously. Due to different resignation timing resulted from personal circumstances of first batch Members, the beginning of the term is not identical from the second batch.

2001-2006	John Lockhart	Australia	Asia
2001-2009	Giorgio Sacerdoti	Italy	Europe
2003-2007	Merit E. Janow	United States	North America
Third Batch			
Term	Members	Nationality	Region
2006-2013	David Unterhalter	South Africa	Africa
2007-2011	Lilia R. Bautista	Philippines	Asia
2007-2011	Jennifer Hillman	United States	North America
2008-2012	Shotaro Oshima	Japan	Asia
2008-2016	Yuejiao Zhang	China	Asia
2009-2017	Ricardo Ramírez-Hernández	Mexico	Central and South America
2009-2017	Peter Van den Bossche	Belgium	Europe
Fourth Batch			
Term	Members	Nationality	Region
2011-2019	Ujal Singh Bhatia	India	Asia
2011-2019	Thomas R. Graham	United States	North America
2012-2016	Seung Wha Chang	Korea	Asia
2014-2018	Shree Baboo Chekitan Servansing	Mauritius	Africa
Fifth Batch			
Term	Members	Nationality	Region
2016-2017	Hyun Chong Kim	Korea	Asia
2016-2020	Hong Zhao	China	Asia

The first seven Members for the Appellate Body were chosen from five different regions, three from Asia. The second batch of appellate body Member's nationality shows similar composition. Without adding or counting out regions, the primary five regions were retained. However, as pointed out in the previous section, the United States, Japan and Egypt continued to represent North America, Asia and Africa respectively. For 8 years, United States, Japan and Egypt kept their position.

Yet, the third batch of Members show change in composition. John Lockhart as the last Member for Oceania, Oceania lost its post in the Appellate Body after 10 years. Since there are seven regions in the world, the opportunity might have been yielded to other regions such as the CIS and the Middle East which were excluded from the beginning. However, the post lost by Oceania went to East Asia. Japan has been representing East Asia for two times and was again elected as a Member in the third batch. At the same time in 2008, Chinese Member joined the Appellate Body. In total, two Members were from East Asia among seven Members. Except for East Asia replacing Oceania, other regions showed similar composition. For example, the United States and Japan were serving the AB for consecutive 3 times. The Philippines which produced a Member in the first batch again turned out a Member this time. Africa, Latin America, and Europe sustained

the regional post in the AB, but new countries won the chance.

In the fourth batch, India replaced post for South/West Asia although a Member from India has served the AB in the previous second batch. For the fourth time, the US again represented North America. After Japanese Member's term finished, Korea replaced the post for East Asia. After David Unterhalter who came from South Africa finished his term Africa's post was replaced with a new Member from new country, Mauritius. A national from Oceania was not appointed again after the second batch.

Since two Members from the third batch completed their terms of office, two successors who are the Members of the fifth batch were elected. Both of them are from East Asia. The Dispute Settlement Body replaced Seung Wha Chang from Korea with Hyun Chong Kim from the same country, and Yuejiao Zhang from China was succeeded by Hong Zhao also from China.

East Asia is comprised of three countries which are China, Korea and Japan. From the third batch, specifically from 2008, two countries simultaneously represent East Asia in the AB. As a result, it can be said that East Asia is overrepresented in the Appellate Body while Oceania lost its post after producing two predecessors.

As of 11 November 11, 2017 the following six judges are serving the AB. Due to resignation of Kim Hyun Jong, a national of Korea, one seat remains vacant.<sup>44</sup>

**Table 5.** Current Appellate Body Member

Term	Member	Nationality	Region
2011-2019	Ujal Singh Bhatia	India	Asia
2011-2019	Thomas R. Graham	United States	North America
2009-2017	Ricardo Ramírez-Hernández	Mexico	Central and South America
2014-2018	Shree Baboo Chekitan Servansing	Mauritius	Africa
2009-2017	Peter Van den Bossche	Belgium	Europe
2016-2020	Hong Zhao	China	Asia

Accordingly, overrepresentation of East Asia is resolved for the moment. Appointment of a new Member to fill the vacancy will be another opportunity to test the broad representativeness of the Appellate Body.

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<sup>44</sup> See Table 5.

### **3.3 Overall Evaluation**

The status quo composition of the Appellate Body does not satisfy the two criteria set beforehand. Some regions have not been represented in the AB and the past composition clearly shows favoritism towards some countries in the region, for example the US.

Lack of WTO membership, small trade volume, passive participation in the dispute mechanism were suggested as three potential causes for the exclusion of certain regions such as the CIS and Middle East. However, the first two causes were denied by empirical evidence while the third cause is the most potent cause for the exclusion. The CIS and Middle East began to actively participate, at least some countries, in the Dispute Settlement mechanism of the WTO. A Member having a nationality of the Middle East or the CIS can hopefully be seen in the future. Yet the future is not bright. Oceania lost its post despite their active participation in the Dispute Settlement system.

If the degree of broad representation does not improve, the legitimacy of the Appellate Body would erode. As repeatedly said, if Members do not represent various legal systems of the world, and thereby

undermine diversity of the court, some countries may become reluctant in utilizing the Dispute Settlement mechanism.



## **Chapter IV. The Second Criteria: Nationality**

### **Influence**

This chapter includes a concept that is very controversial. An issue of nationality influence on international judges is deep-rooted controversies that had begun from the establishment of international courts. Therefore, one should be careful not to misperceive that a judge's favorable decision toward his or her home country means that his or her decision is biased. Every circumstance, every decision should be taken into account with discreet care. And this chapter only suggests doubt and does not have an articulate conclusion since this topic has been controversial and full of dissenting and diverse opinions. Introduction of diverse opinions of the scholars and at the last tries to apply one of them into the current Appellate Body.

Gordon, Burton, Falk and Franck (1989) introduce skepticism toward national judges in their paper.<sup>45</sup> The question with respect to national bias of judges in international courts is deep-rooted in history. The

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<sup>45</sup> See Gordon, E., Burton, S., Falk, R., & Franck, T. (1989). The Independence and Impartiality of International Judges. *Proceedings of the Annual Meeting (American Society of International Law)*, 83, 508-529. Retrieved from <http://www.jstor.org/stable/25658513>

records of 19<sup>th</sup> and early 20<sup>th</sup> century arbitration contain wide-spread doubt towards international judges' inclination toward their own government's political and economic interests.<sup>46</sup> There are a number of restraints that can prevent judges from nationalistic behavior such as 'courtroom setting, small group setting of the panel, and rules of international law'.<sup>47</sup> Yet these constraints cannot fully overcome the doubts by the skeptics.<sup>48</sup>

Additionally, a view that international judges can hardly stay impartial and independent from the home state is prevalent in old academia.<sup>49</sup>

Indeed, international courts employ following nationality limit of a judge in order to secure independence in their institutional design.<sup>50</sup> First, a limit on the number of judges from one nationality exist in most international courts. Second, the nationality bias is receded by the ad hoc judge rules. When one party to the dispute has its own national as a judge on the bench, the other party can offset this by appointing an ad hoc judge. Finally, some international courts have a rule that a judge has to excuse from

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<sup>46</sup> *Supra* note 45, p.510

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Supra* note 20.

<sup>50</sup> *Supra* note 20, p.109

the cases that includes his or her nationality.<sup>51</sup>

#### **4.1 Related Rule and Interpretation**

The Appellate Body also has a rule that concerns nationality of the Members. The DSU has two related articles to the nationality issue of the Appellate Body composition.

#### **Appellate Body Working Procedures for the Appellate Review,**

##### **Article 6**

(2) The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.

#### **DSU 17.1**

A standing Appellate Body shall be established by the DSB. The

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<sup>51</sup> *Supra* note 20, p. 89

Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

The WTO Appellate Body rules differ from that of panel's where national of the dispute party and third party are banned from serving as a panelist.<sup>52</sup> In that the WTO Appellate Body allow the national of the dispute to serve the case.

According to the Article 6 (2) of the Working Procedures for Appellate Review, the Members constituting the division hearing and deciding a particular appeal are selected on the basis of rotation taking into account the principles of random selection and unpredictability, and opportunity for all Members to serve, regardless of their nationality is guaranteed.<sup>53</sup> Contrary to the process for panelist selection, the nationality is not considered for the selection of Appellate Body Members and they can

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<sup>52</sup> DSU Article 8.3

<sup>53</sup> WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/3, para. 6

be assigned to cases that involve their countries of origin.<sup>54</sup>

## **4.2 Hypothesis Tested**

Whether a nationality of a judge affects impartiality and independence of the international court is a controversial issue and thereby demands a cautious approach.

In order to test the hypothesis of judicial nationalism, I will analyze the nationality influence on the Appellate Body by reviewing earlier literatures that contemplated through nationality influence on the international court or Appellate Body.<sup>55</sup> There are both qualitative and quantitative analyses. I will look into their methods and discuss about the results.

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<sup>54</sup> Bossche, P. (2005). *The law and policy of the World Trade Organization: Text, cases, and materials* / Peter van den Bossche. Cambridge; New York: Cambridge University Press, p. 247

<sup>55</sup> The influence of nationality in this section refers to influence on results of the Appellate Report.

#### **4.2.1 Studies arguing weak relationship between the result and nationality of a Judge**

Jackson (1998) points out structural inevitability for impartiality in the Appellate Body. He asserts that “it is fair to say that one cannot detect nationality influence on the Appellate Body” on the ground that the Appellate Body report shows no indication of particular authorship or provision for dissenting opinions and thereby attributing itself only to three members of the roster which sat in the division.<sup>56</sup>

Also, Vermulst, E., Mavroidis, P. C., & Waer, P. (1999) added that an AB Member having the nationality of one of the disputants does not have influence on the Appellate Body ruling since the Panel proceeding, the previous stage, blocks members of the disputing countries from serving as panelists.<sup>57</sup> Moreover, the random distribution of cases by the lottery system detaches the AB cases from the influence of nationality.

Dannenbaum (2012) argues that nationality of a judge is no unique factor other than character traits and combination of experiences of a judge.

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<sup>56</sup> Jackson, J. H. (1998). Dispute Settlement and the WTO: Emerging Problems. *Journal of International Economic Law*, 1(3), 329-351, p. 341

<sup>57</sup> Vermulst, E., Mavroidis, P. C., & Waer, P. (1999). The Functioning of the Appellate Body after Four Years: Towards Rule Integrity. *Journal of World Trade*, 33(2), 1–50, p.16

He elaborates that “every judge is the product of a unique combination of experiences and character traits, many of which are relevant to her perspective on law and society.”<sup>58</sup>

A study conducted by J. Maton and C. Maton (2007) observes whether and how it is possible for powerful Complainant states to have leverage on the Panel or Appellate Body proceedings through extra-legal means. Their study bears significance in that it clarifies whether exertion of external influence of states beside legal interpretation is possible. The influence may be in the form of “deliberate action taken by states, or strategic choices made by Panels or the Appellate Body”<sup>59</sup>, and the extra-legal means were classified into three categories—political power, economic power and practical capacity. However, the result did not show the tendency that strong states substantially enjoys high rate of winning. The two authors tested the cases of the EC and US considering their high rate of participation in the WTO dispute either as complainant or respondent and strong economic influence. According to their analysis, it is true that the EC and US succeeds obtaining favorable result in the dispute settlement mechanism

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<sup>58</sup> *Supra* note 20, p.121

<sup>59</sup> Maton, J. & Maton, C. (2007). Independence Under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement. *Journal of International Economic Law*, 10(2), 317–334, p. 325

of the WTO. Nevertheless, this cannot be interpreted as bias. When the regression analysis for the trend was executed, the result proves that winning rate and national bias have weak relationship.<sup>60</sup>

#### **4.2.2 Studies arguing strong relationship between the result and nationality**

However, opposite view exists. Posner and de Figueiredo (2005) classified how a national identity influences the decision making of the judges in three causes: psychological, economical, or via selection effects.<sup>61</sup> First, psychology deviates a judge from impartiality since judges have “spent their careers in national service as diplomats, legal advisors, administrators, and politicians.”<sup>62</sup> This applies to the AB Members since they led political, legal or diplomatic career in their nations. Second, judges are swayed by economic motivation. Judges need various supports from their home state. First, home support for international judges is essential for the reappointment. Second, after their terms the judges have to go back to

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<sup>60</sup> *Ibid.*

<sup>61</sup> Eric A. Posner; Miguel F. P. de Figueiredo. (2005). Is the International Court of Justice Biased. *Journal of Legal Studies*, 34, 599–630, p. 608

<sup>62</sup> *Ibid.*



their home state. Judges who have served in international courts have big probability to gain a seat in the government after their terms in the organization.<sup>63</sup> Lastly, impartial judges are excluded from the very beginning through the selection process. Governments nominate judges, and in this process they can ensure that their nominees are not too independent from the government.<sup>64</sup>

Smith, J. M. (2003) also showed skeptical point of view in the opaque rotation process and high rate of a Member assigned to cases against his or her home country.<sup>65</sup> The way of assigning cases to the Appellate Body Members is based on rotation. Even so, Smith raises a suspicion about the randomness of the process since cases that involves the US or EC has higher percentage of their nationals serving the case compared to completely random process would have.

The study of Garrett and Smith (1999) did not specifically deal with nationality issue. Yet, they discovered the Appellate Body's reluctance to make strong and unequivocal adverse rulings against powerful WTO Members by examining particular decisions that involve the US and the

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Smith, J. M. (2003). The WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings. *World Trade Review*, 2:1, 65-100

EC.<sup>66</sup>

### **4.3 Application to the Current Appellate Body**

In order to verify whether there exists home state advantage in the Appellate Body, 128 cases that were brought to the AB will be studied in various ways.<sup>67</sup>

#### **4.3.1. Posner and De Figueiredo “Home-state Advantage” (2005)**

As a methodology to study impact of nationality on the AB decision, I will apply Posner and De Figueiredo’s earlier study on nationality influence to the ICJ proceedings to the Appellate Body.<sup>68</sup>

They tested whether Judges of the ICJ favored their home states in proceedings. They set a hypothesis that ICJ judges vote in favor of their

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<sup>66</sup> *Supra* note 9.

<sup>67</sup> 130 cases were brought to the Appellate Body as of November 2017, yet they were counted as 128 in this thesis. One case was withdrawn by the Appellee, India. Another case, Dispute Number 27 was merged into one case since the EC, appellant, filed appeal separately, yet two cases were handled by same AB Members.

<sup>68</sup> See Posner and De Figueiredo (2005), *supra* note 52.

home state. Then they divided the ICJ judges into party judges who has same nationality with either applicant or respondent, and nonparty judges and counted the percentage of favorable proceeding made by a party judge and nonparty judge respectively.

According to the logic of De Figueiredo (2005), the methodology to judge the national bias of the Appellate Body was set.

However, there was one obstacle to apply their method to the Appellate Body. In contrast with the ICJ judgements where names of Judges who votes for and against are identified, opinions expressed in the Appellate Body's reports by individuals serving on the Appellate Body have to stay anonymous.<sup>69</sup> Since the Appellate Body report is the result of agreement of three AB Members, individual AB Member's favoritism who has the same nationality with the parties to the dispute is undiscoverable. Therefore, the nationality influence can be measured only indirectly and may neutralize by other judges.

However, the purpose of the study lies in finding out whether case that involve an AB Member who has same nationality with the parties to the dispute is influenced by the nationality or not. Therefore, this study would

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<sup>69</sup> DSU Article 17.10

gratify doubts of the states whether they could trust the Appellate Body Members although they have other dispute party's national or they do not have their own national among three Appellate Members. This is significant since the AB does not provide the ad hoc judge system of the ICJ which allows the party to choose an *ad hoc judge* if the counter party has its own national on the bench.<sup>70</sup>

Accordingly, one difference made in Posner and De Figueiredo's methodology is that they calculated the ICJ by the unit of "votes", and AB will be calculated in "cases"

**Table 6.** Four categories of the AB Case results

1	2
AB Members in charge have same nationality with the Appellant + Favorable Result for the Appellant	AB Members have same nationality with the Appellee + Favorable Result for the Appellee
3	4
AB Members have different nationality with the Appellant + Favorable Result for the Appellant	AB Members have different nationality with the Appellee + Favorable Result for the Appellee

128 cases were brought to the AB as of November 2017, and each

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<sup>70</sup> ICJ Statute Article 31.2

case will be categorized into four groups as the Table 6 in order to test national bias. Then, the proportion of favorable result for each four categories will be compared. When a same country is both appellant and appellee due to the cross-appeal, such a case is counted twice but separately in each category, once in appellant side and once in appellee side.

The favorable result should defined in advance of the analysis. A simple logic of defining the one who violated the WTO rule and hence were asked to bring its action into conformity by the DSB is the loser and the other side is the winner is implemented. For instance, assume that Korea is appellant and Thailand is appellee. If the Appellate Body report demands Korea to bring action into conformity with the WTO rule, Korea is the loser and the proceeding in this case is favorable to Thailand.

By comparing the numerical value of four categories, the impact of the nationality of the AB Member to the AB decision can be drawn out. This is to find out whether the existence of an AB Member that has same nationality with the party to the dispute draws out favorable result for the relevant party.

## **1) ICJ Results**

In the study of Posner and De Figueiredo (2005), they attained a surprising result that the ICJ Judges are biased since “Judges vote in favor of their home states”.<sup>71</sup>

**Figure 5.** National Bias of the ICJ Judges

**Table 1.** Votes of Party and Nonparty Judges in Proceedings

Judge	In Favor of Applicant		In Favor of Respondent	
	Ratio	%	Ratio	%
Party:				
National	15/18	83.3	34/38	89.5
Ad hoc	57/63	90.5	37/41	90.2
Total	72/81	88.9	71/79	89.9
Nonparty	648/1,277	50.7	629/1,277	49.3

While they voted in favor of non-home parties with the probability of 50.7%; they voted favorably for home states with the chance of 88.9% for applicants, and 89.9% for respondents.<sup>72</sup> Posner and De Figueiredo argued that “substantial evidence that party judges vote in favor of their home state”

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<sup>71</sup> *Supra* note 52, p. 615

<sup>72</sup> *Ibid.*

exists.<sup>73</sup>

However, they suggested two means that such an impartiality could be offset. First, the party judges can offset each other's vote, and unbiased nonparty judges' votes make it possible for the ICJ as a whole produce impartial decisions.<sup>74</sup>

## **2) AB Results**

Now, the logic of Posner and De Figueiredo will be applied to the Appellate Body. As iterated beforehand, "cases" that contain national Members will be calculated. The database listing nationality of the AB Members' and parties to the dispute in entire 128 cases can be found in the Annex 2.

Before executing a test for the AB, the neutrality was tested in the 128 cases that were brought to the WTO, and the result is laid out in the Table 7.<sup>75</sup> In the first row, Members' relationship with the parties to the

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<sup>73</sup> See Figure 5.

<sup>74</sup> *Supra* note 52, p. 615

<sup>75</sup> See Table 7.

dispute is displayed. There are two possibilities. An AB Member can have same nationality with the parties—appellant, appellee, or both<sup>76</sup>—or may have no relationship.

**Table 7.** Neutrality Test

	Members' Relation with Nationality of			Neutral
	Appellant	Appellee	Both	
Number of Cases	45/128	48/128	68/128	31/128
Probability	0.35	0.38	0.53	0.24

AB Members having nationality of the appellant were involved in 45 cases, and similarly in 48 cases they had same nationality as the appellee. For over half of the cases, the AB Members' nationality corresponded with the parties to the dispute both appellant and appellee side. The neutral cases which involve no AB Members of a national from either appellant or appellee were only 31 cases, which occupies 24 percent from the entire

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<sup>76</sup> Three Appellate Members take charge of a case, hence one judge may have nationality of an appellant while another judge have nationality of appellee.



case.<sup>77</sup> This shows that the Appellate Body shows low rate of neutrality. Although AB Members happened to serve on cases that involves their own country based on random distribution, the neutrality rate is significantly low.

Having the neutrality checked, the nationality influence on Appellate Body's decision is arranged in the Table 8.

**Table 8.** Ratio of Favorable Result for the AB

Judge	In Favor of Appellant			In Favor of Appellee		
		Ratio	%		Ratio	%
National	1	25/48	0.52	2	33/54	0.61
Nonparty	3	15/80	0.19	4	65/74	0.88

The result is complex for the Appellate Body compared to that of the ICJ. The ICJ had clear distinction between votes of party judge and non-party judge (vertical comparison). The party judges showed significantly higher proportion of favorable vote for their home country and this trend was common either for the appellant or appellee (horizontal comparison). However, the Appellate Body shows mixed results:

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<sup>77</sup> See Table 9.

### 1. Vertical Comparison: (influence of nationality factor in favorable ruling)

Vertical comparison between category 1 & 3, and 2 & 4 is to test the influence of existence of an AB Member whose nationality is party to dispute in making favorable rulings towards home state parties.<sup>78</sup> In the case of Appellant (category 1 & 3), the cases that had national of appellant attained favorable ruling to the appellant at the rate of 0.52. Interestingly, in neutral cases where AB Member that had same nationality with the appellant were not involved, appellant won the case with the probability of 0.19. The existence of a national AB Member made 0.31 percent difference in winning the case.

However, the result for the appellee side is different (category 2 & 4) is different. They showed higher ratio of winning the case compared to result of appellant regardless of the nationality influence. The major difference is that appellee had higher chance of winning the case in neutral cases where they had no home AB Member serving the case: appellee won the case with the ratio of 0.61 when they had AB Member of its nationality in the case while neutral AB Members gave favorable proceeding for the appellee with the ratio of 88%.

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<sup>78</sup> See Table 7 for categories.

To sum up, having AB Members of the same nationality as the parties to the dispute had lower influence in results compared to the ICJ. Although appellants having the AB Member who has same nationality as theirs produced higher winning chance by 0.31 percentage, the ratio of 0.52 is hard to be interpreted that the AB Members have favoritism towards their state parties. Also, for the appellee side, appellees had more chance of attaining favorable result when the case was served by neutral judges. Consequently, the hypothesis that there is a home state advantage is unsubstantiated.

## 2. Horizontal Comparison (influence of appellant and appellee factor in favorable ruling)

The AB shows difference between ratio of appellant and appellee. Appellee has higher ratio of winning regardless of involvement of national AB Member. The non-party AB Members gave favorable result for appellant with the ratio of 0.19 while appellee received 0.88 percent of favorable result. The complexity lies in the essence of the Appellate Body. Appellate Body has limited jurisdiction as mentioned in the Chapter 1, Introduction. The investigations and facts made by the panel cannot be touched and the Appellate Body only deals with questions of law in the

panel report. The results hardly change. In fact, among cases that involved national AB Members, there were only two cases where the winner and loser changed.<sup>79</sup> Losers (appellant) usually make an appeal; the AB rarely change the result; the result in the panel is sustained. In other words, winners (appellee) stay as winners. This can explain why there is big difference between the proportion of appellant and appellee.

The finding of application to the Appellate Body shows the positive result that the AB ruling and nationality of the pertinent Member have weak relationship.

#### **4.4 Overall Evaluation**

The home state advantage does not distinctively appear in the Appellate Body. Yet the neutrality of the case is worrisome due to high proportion of Members serving cases that involve their home states. This is especially apprehensive for the parties bringing case to the Appellate Body since the organization does not have any device of balancing the nationality

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<sup>79</sup> DS 139, 142 and DS 296.

influence as the ITLOS and the ICJ have.<sup>80</sup>

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<sup>80</sup> The ITLOS is aware with the nationality influence of a judge to the ruling. The ITLOS statute reads:

**Article 17**

*Nationality of members*

1. Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal.

2. If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.

Just as the Appellate Body, the ITLOS does not limit the participation of a Judge who has nationality of any of the parties to the dispute. However, any other party can choose a person to participate in the case, hence offsetting the influence of nationality in producing results.

ICJ also has a device to offset the influence of a national judge. Under Article 31 paragraphs 2 and 3 of the Statute of the Court, a State party to a case before the International Court of Justice which does not have a judge of its nationality on the Bench may choose a person to sit as judge *ad hoc* in that specific case under the conditions laid down in Articles 35 to 37 of the Rules of Court. Before taking up his/her duties, a judge *ad hoc* is required to make the same solemn declaration as an elected Member of the Court. He/she does not necessarily have to have (and often does not have) the nationality of the designating State. See ICJ website, <http://www.icj-cij.org/en/judges-ad-hoc> for more information.

## Chapter V. The Third Criteria: Expertise in Trade Remedy

Beside impartiality, legitimacy of a court also stems from quality of judges, from their expertise of the Judges on pertinent subject of the matter of the court.<sup>81</sup> In the case of the Appellate Body, the ruling made by Members can demand a state financial compensation which directly affects a state's economic interest. Therefore, Appellate Body Members' ability to make a correct decision has an impact on credibility, and furthermore, legitimacy of the Appellate Body.

### **5.1 Related Rule and Interpretation**

#### **DSU 17.3**

The Appellate Body shall comprise persons of recognized authority, with demonstrated *expertise in* law, international trade and the subject matter of the *covered agreements generally* (...)

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<sup>81</sup> C. Basak, A. Koch, and N. Bruch (2011). The Legitimacy of the European Court of Human Rights: The View from the Ground. Unpublished manuscript, University College London. <http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf>

Regarding such aspect, the DSU Article 17.3 stipulates Appellate Members' expertise in law, international trade, and the subject matter of the covered agreements generally. Expertise in law and international trade is quite explicit. Yet the 'subject matter of the covered agreements generally' needs further description.

144 Appellate Reports have been circulated from 1996 to 2016 and they addressed following agreements: DSU; The General Agreement on Tariffs and Trade 1994 (GATT 1994); WTO Agreement on Subsidies and Countervailing Measures (SCM); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement); Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement); The WTO Agreement on Agriculture (Agriculture); The Agreement on Technical Barriers to Trade (TBT); The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); Article XIX of GATT 1994 and the Agreement on Safeguards (Safeguards Agreement); General Agreement on Trade in Services (GATS); Agreement on Trade-Related Investment Measures (TRIMs); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); WTO Agreement on Textiles and Clothing (APC); and import licensing.

These agreements are what a WTO Appellate Body Member should

show expertise at. Among these various agreements addressed in the Appellate Body, this thesis will focus on legal competence of the Appellate Body on trade remedy cases since they are key subject dealt in the WTO Appellate Body, and at the same time, controversial topic that instigate dissatisfaction among countries, especially China and the US. Significance of trade remedy issue has been explained in Chapter 3 already.

## **5.2 Evaluation of WTO Appellate Body's Competence on Trade Remedy Issue**

### **5.2.1 Criteria for Evaluation and Observation**

The vagueness of the word 'expertise' makes it hard to assess Appellate Body members' expertise. Yet, education and job experiences could be a strong reference to test one's expertise. In the same sense, Appleton and other literatures adopted education and job experience as a standard to evaluate expertise of a Member. Also, I thought legal support by an expert group can add proficiency to the Appellate Body.

After inspecting the status-quo of the Appellate Body's competence for dealing with the trade remedy issue, two observations were made. First,



the standing Appellate Body lacks Members who have expertise or experience in trade remedy area. Second, legal assistance from the trade remedy experts of Rules Division in the panel level is not provided in the AB level, hence eroding the legal competence of the Appellate Body on trade remedy issue.

### 5.2.2 First Observation: Individual Level

The first observation will be made in the individual level, delving into competence of the Appellate Body Members on trade remedy issue. In doing so, the Members' past job experiences and education are diagramed in the Table 9.<sup>82</sup> The contents in the table referred to the biography posted on the WTO website and variables are drawn out from Appleton's study.<sup>83</sup>

**Table 9.** Appellate Body Members' Background

First Batch				
Term	Members	Areas of Study	GATT panel	Background

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<sup>82</sup> See Table 9.

<sup>83</sup> See [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)

			experience	
1995-2000	James Bacchus	Law, History	No	Congressman, Special Assistant to the USTR
1995-2000	Christopher Beeby	Law	No	Ambassador, career diplomat
1995-2001	Claus-Dieter Ehlermann	Law	No	Professor, Director General Legal Services for EU Commission
1995-2000	Said El-Naggar	Economics, Law	No	Professor, international civil servant (UNCTAD, UN, World Bank)
1995-2001	Florentino Feliciano	Law	No	Supreme Court Judge, private practitioner
1995-2001	Julio Lacarte-Muró	Trade and economics background	Yes	Minister, Ambassador, career diplomat
1995-2000	Mitsuo Matsushita	Law	No	Professor
Second Batch				
Term	Members	Areas of Study	GATT panel experience	Background
2000-2008	Georges Michel Abi-Saab	Law, economics, political science	No	Professor
2000-2008	Arumugam V. Ganesan	Chemistry	Yes	Commerce Secretary, career civil servant
2000-2007	Yasuhei Taniguchi	Law	No	Professor

2001-2009	Luiz Olavo Baptista	Law, Business administration	No	Professor, Attorney
2001-2006	John Lockhart	Law, arts	No	International civil servant (ADB, World Bank), judge
2001-2009	Giorgio Sacerdoti	Law	No	Professor
2003-2007	Merit E. Janow	Law	Yes	Professor, Deputy Assistant US Trade Representative
Third Batch				
Term	Members	Areas of Study	GATT panel experience	Background
2006-2013	<b>David Unterhalter</b>	Law	Yes	Professor, private practitioner
2007-2011	Lilia R. Bautista	Law, business	No	Career civil servant, senior undersecretary, Ambassador to WTO
2007-2011	<b>Jennifer Hillman</b>	Law, education	No	Member of the US International Trade Commission <sup>84</sup> , chief legal counsel to the USTR
2008-2012	Shotaro Oshima	Law	No	Ambassador to WTO, career diplomat, civil servant
2008-2016	Yuejiao Zhang	Law	No	Professor, private attorney, international civil servant (ADB,

<sup>84</sup> International Trade Commission is an agency that makes decisions related to anti-dumping and countervailing legal issues, and conducts safeguard investigations.

				World Bank), civil servant <sup>85</sup>
2009-2017	Ricardo Ramírez-Hernández	Law	No	Private practitioner, civil servant
2009-2017	Peter Van den Bossche	Law	No	Professor, Appellate Body Secretariat
Fourth Batch				
Term	Members	Areas of Study	WTO panel experience	Background
2011-2019	Ujal Singh Bhatia	Economics	Yes	Ambassador to the WTO, career civil servant
2011-2019	<b>Thomas R. Graham</b>	Law, international relations, economics	No	Private Practitioner, civil servant <sup>86</sup> , international civil servant (UNCTAD)
2012-2016	Seung Wha Chang	Law	Yes	Professor, Judge, private practitioner
2014-2018	Shree Baboo Chekitan Servansing	Sociology, foreign affairs and international trade	No	Ambassador to WTO, career civil servant
Fifth Batch				
Term	Members	Areas of study	WTO panel experience	Background

<sup>85</sup> She served as the Director-General of Law and Treaties at the Ministry of Foreign Trade and Economic Cooperation. She drafted Chinese Anti-Dumping Regulation and the Anti-Subsidy Regulation.

<sup>86</sup> Deputy General Counsel, US Trade Representative

2016-2017	Hyun Chong Kim	Law	No	Civil servant, ambassador to UN, international civil servant (UN Economic and Social Council) <sup>87</sup> , Appellate Body Secretariat, WTO Legal Affairs Division, Professor
2016-2020	Hong Zhao	Law	No	Civil servant

Source: WTO Appellate Body Member Biography and Appleton (2016)

The Appellate Body Members' high level of education and various social positions they have gone through are impressive. However, development of expertise in trade remedy is a different issue from one's education level and high class social positions.

This paper intends not to criticize the Appellate Body Members but rather the criticism directs towards the system and the DSB for overlooking the significance of the trade remedy. This is to criticize the system which does not consider trade remedy as a significant criteria when appointing a Member not to place doubt on individual qualification of the Members.

The truth is—putting Members' devoted years of education and admirable career aside—the Appellate Body generally lacks pundits in trade remedy area. As aforementioned, the expertise is measured with education

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<sup>87</sup> Vice President of the UN Economic and Social Council

and profession. I would like to focus on the profession as the standard to test one's expertise since one's area of study is in line with one's profession. I considered following professions as capable to acquire expertise in trade remedy: private practitioner who have dealt with multiple trade remedy cases, and civil servant who worked for the specialized governmental department for trade remedy.<sup>88</sup>

3 Members out of 27 satisfy this comparatively lenient standard.

First, David Unterhalter can be seen as competent in trade remedy since he handled a large number of cases in the fields of trade law, competition law, constitutional law, and commercial law as a practicing advocate. He gained expertise in trade remedy by representing different parties in trade remedy cases in South African court. The leading trade remedy cases he took charge of are:

- Samsung (anti-dumping duties in the cable industry)
- Johnson and Johnson (anti-dumping investigation in health care products)
- Ranbaxy (anti-dumping in the pharmaceutical industry)

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<sup>88</sup> Peter Van den Bossche and Kim Hyun Jong have worked for the Appellate Body Secretariat, former as a Counsellor and subsequently Acting Director and the latter as a senior lawyer. These two Members' expertise in trade remedy is not distinctively noticeable.

- Prestige Holdings (revision of duties)
- Brenco v Minister of Trade and Industry (judicial review of an anti-dumping investigation)
- Scaw Metals v ITAC (urgent injunctive relief and judicial review of a sunset review)

With the expertise acquired by dealing with before mentioned cases, he also advised South African authorities on the revision of the trade remedies legislation and has acted in many cases of judicial review concerning the domestic regulator.<sup>89</sup>

The second Member who has expertise in trade remedy is Jennifer Hillman. Her nine years' experience as a Commissioner at the United States International Trade Commission (USITC) explicitly demonstrates her proficiency in trade remedy issue. As a Commissioner, she rendered decisions in more than 600 investigations on imports that injured US industries by dumping or illegal subsidies.<sup>90</sup>

Thomas R. Graham is the third member who attained judicial

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<sup>89</sup> His biographies are available at <https://www.monckton.com/barrister/david-unterhalter-sc/> and at the WTO website.

<sup>90</sup> Her biography is available from <https://www.law.georgetown.edu/faculty/hillman-jennifer-a.cfm#>

acumen in trade remedy sector by working as a private practitioner. According to his biography in the WTO website, he was senior counsel of the international trade practice at King & Spalding, and at the same time he established international trade practice at Skadden, Arps. Also he represented various respondents in trade remedy cases.<sup>91</sup>

When converted into percentage, only 11.1 % of whole Members have expertise in trade remedy issue while around 50% of the cases dealt in the Appellate Body involve trade remedy agreements. Considering the number of cases that involve trade remedy, the number of Members who are apt in interpreting trade remedy rules and applying them to real cases is too small.

There have been 66 trade remedy cases so far. However, 14 cases involved three Members who had expertise in trade remedy. Considering that only 21.2% cases were dealt by experts in trade remedy, the legitimacy of the Appellate Body perilous regarding the trade remedy case.<sup>92</sup>

### **5.2.3 Second Observation: Structural level**

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<sup>91</sup> See [https://www.wto.org/english/tratop\\_e/dispu\\_e/popup\\_thomas\\_graham\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/popup_thomas_graham_e.htm)

<sup>92</sup> See Annex 1. The cases served by Hillman, Unterhalter, and Graham are colored in grey.



The previous chapter focused on assessing Appellate Body's competence in trade remedy by looking at individual judge's competence. In this part, the Appellate Body's competence in trade remedy issue will be tested by observing the structure of the organization. I have mentioned that legal support by a trade remedy expert group can add and complement expertise to the Appellate Body. The representative example is the WTO panel's Rules Division.

The WTO website introduces role of Rules Division as “(...) providing all necessary implementation assistance, counselling and expert advice to WTO members concerning the above agreements (anti-dumping, subsidies and countervailing measures, safeguards, trade-related investment measures, state-trading and civil aircraft) providing secretaries and legal officers to WTO dispute settlement panels involving these agreements and participating in the WTO technical assistance programme”.<sup>93</sup>

The composition of the Rules Division shows its expertise in trade remedy. It is consisted of internal bodies such as Negotiating Group on Rules, the Committee on Anti-Dumping Practices, the Committee on Subsidies and Countervailing Measures, the Committee on Safeguards, the Committee on Trade-Related Investment Measures, the Committee on Trade

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<sup>93</sup> [https://www.wto.org/english/thewto\\_e/secre\\_e/div\\_e.htm](https://www.wto.org/english/thewto_e/secre_e/div_e.htm)

in Civil Aircraft, the Working Party on State-Trading Enterprises, the Permanent Group of Experts of the Subsidies Agreement as well as the Informal Group on Anti-Circumvention and the Working Group on Implementation, both concerning the Agreement on Anti-Dumping.<sup>94</sup>

The Rules Division is currently directed by Johann Human, the former Head of the Trade Remedies Unit of South Africa, panelist, and author of *A Handbook on Anti-Dumping Investigations*. Although the information of employees is not made public, the WTO Annual Report introduces new recruits. According to the Report, Seref Gokav Coskun, a technical trade specialist was recruited in 2015, who was the former Head of Section at the Dumping and Countervailing Duties Investigations Department of Turkey's Ministry of the Economy. As a practitioner, he actively involved in Turkey's trade policy implementation, and conducted several trade remedy investigations.<sup>95</sup>

In contrast to the panel, the Appellate Body has a general support group, the WTO Appellate Body Secretariat in which director of the Secretariat and a team of ten lawyers and four support staffs provide legal and administrative support to the Appellate Body to general matters dealt in

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<sup>94</sup> *Ibid.*

<sup>95</sup> WTO Annual Report 2015

the appeals.

The absence of the expert group specializing in trade remedy for the Appellate Body is a serious problem considering Appellate Body's high dependence on Secretariat. Compared to other international courts, panels and the Appellate Body has stricter time limits of 90 days. Therefore, it encourages panels and the Appellate Body to rely more on Secretariat's expertise.<sup>96</sup>

Moreover, the Secretariat strongly influences the Appellate Body decisions. Appleton explains the Secretariat's influence on Appellate Body as follows:

“Certain senior Members of the Appellate Body Secretariat have held their positions far longer than sitting Appellate Body Members and to some extent serve as the guardians of continuity. In many if not most disputes, the Appellate Body Secretariat has a much better understanding of WTO law and practice than sitting Appellate Body Members. The Secretariat understand the judicial history, the gradual evolution of judicial thinking on certain issues, and they often play an important role advising Appellate Body Members and, as already

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<sup>96</sup> Shaffer, G., Elsig, M., & Puig, S. (2016). The Law and Politics of WTO Dispute Settlement. *UC Irvine School of Law Legal Studies Research Paper*, 10, 1–32, p.13

noted, drafting Appellate Body decisions.”<sup>97</sup>

To sum up, Appellate Body Secretariat is a body that bears substantial importance in that Appellate Body decisions depend on the Secretariat heavily. Nevertheless, the problem is that the current Appellate Body Secretariat does not possess expertise on trade remedy that Appellate Body can rely on. According to an interview with the trade law expert<sup>98</sup>, the Appellate Body Secretariat does not have pool of lawyers who have expertise specified in trade remedy. This contrasts the Rules Division of the panel.

### **5.3 Overall Evaluation**

Appellate Body’s competence on trade remedy is worrisome. Only 11% of the Appellate Body Members have expertise in trade remedy while half of the Appellate cases are trade remedy cases. Moreover, the Secretariat which is the single helping hand for the Appellate Body does not have

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<sup>97</sup> Appleton, *supra* note 39, p. 15

<sup>98</sup> Anonymous. Personal interview. 27 November 2017.

competence in trade remedy as well. The quality of the Appellate Body report has possibility of slipping behind that of panel's on trade remedy issue.

## **Chapter VI. Conclusion**

The legitimacy of the Appellate Body was tested with three criteria: broad representation for the diversity and accessibility of the court; nationality influence for the fairness and neutrality of the court; expertise in trade remedy for quality of rulings.

In the first and third criteria, problems were detected. The Appellate Body rather partially represented the WTO Membership than broadly representing it compared to other classical courts. An AB Member from the CIS and Middle East have been never appointed while East Asia has been overrepresented, and certain states have occupied the seat repeatedly. Also, the Appellate Body Members who are expert in trade remedy is well below the demand when trade remedy cases occupy approximately half of the disputes brought to the WTO. Nevertheless, the serious problem was not detected in second criteria. The intactness between nationality of an Appellate Member and favorable decision for the home state was weak. Yet the neutrality of the case was worrisome.

There are also inside voices from the Appellate Body for the reform of the organization. The former Member of the Appellate Body, Georgio Sacerdoti suggested following possible remedial solutions for the

independence and impartiality of the organization:

- Staffing the Appellate Body more adequately
- Increasing the number of Appellate Body members from seven to nine
- Making their position permanent, a status that would also better ensure in the future the selection of competent, diverse and truly independent judges
- Replacing their four-year term, renewable once, with one non-renewable seven-year term, so to avoid any possible improper interference with their independence and impartiality by the WTO members through the renewal process.<sup>99</sup>

However, it seems that Appellate Body has a long way to go. The past discussions by the WTO Members regarding the reform of the DSU on this matter shows meager progress due to failure of reaching the consensus.

If the problems above are not handled, the legitimacy of the Appellate Body would gradually wear away.

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<sup>99</sup> Sacerdoti, Giorgio, The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges (June 1, 2016). Bocconi Legal Studies Research Paper. Available at SSRN: <https://ssrn.com/abstract=2809122>

As of November 2017, the WTO Appellate Body is facing a grave momentum since the DSB has to fill three vacancies that would occur before the end of 2017.<sup>100</sup> The WTO DSB could use this opportunity of new appointment in order to fix the problem and improve the legitimacy of the WTO Appellate Body.

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<sup>100</sup> Kim Hyun Jong resigned from the post due to government service. Term of Peter Van den Bossche and Ricardo Ramírez-Hernández ends in 2017.



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## Annexes

### **Annex 1. Votes of Party and Nonparty Members in Proceeding of the Appellate Body**<sup>101</sup>

Dispute Number	Appellant	Appellee	Respective Nationality of the judges			Loser	1	2	3	4
2	US	Brazil, Venezuela	Philippines	New Zealand	Japan	US				o
8, 10, 11	Japan, US	Japan, US, Canada, EC	Uruguay	United States	Egypt	Japan	o	o		
24	Costa Rica	United States	Germany	Philippines	Japan	US			o	
22	Philippines, Brazil	Philippines, Brazil	Egypt	Germany	Uruguay	Philippines				o
33	India	US	New Zealand	United States	Japan	US			o	
31	Canada, US	Canada, US	Japan	Germany	Uruguay	Canada				o
27	EC, Ecuador, Guatemala, Honduras, Mexico, US	EC, Ecuador, Guatemala, Honduras, Mexico, US	United States	New Zealand	Egypt	EC	o	o		
50	India	US	Uruguay	United States	New Zealand	India		o		
26, 48	EC, US, Canada	EC, US, Canada	Philippines	Germany	Japan	EC				

<sup>101</sup> 1: Favorable decision for Appellant + AB Member has same nationality with Appellant

2: Favorable decision for Appellee + AB Member has same nationality with Appellee

3: Favorable decision for Appellant + AB Member has different nationality with Appellant (non-party Member)

4: Favorable decision for Appellee + AB Member has different nationality with Appellee (non-party Member)

56	Argentina	US	Egypt	Philippines	Japan	Argentina				o
62, 67, 68	EC	US	New Zealand	Germany	Uruguay	US			o	
69	Brazil, EC	Brazil, EC	United States	Egypt	Philippines	EC				o
58	US	India, Malaysia, Pakistan, Thailand	Philippines	United States	Uruguay	US				o
18	Australia, Canada	Australia, Canada	Germany	New Zealand	Egypt	Australia				o
60	Guatemala	Mexico	Uruguay	New Zealand	Egypt	Guatemala				o
75, 84	Korea	EC, US	Japan	Germany	Philippines	Korea		o		
76	Japan, US	Japan, US	New Zealand	Uruguay	Japan	Japan				
46	Brazil, Canada	Brazil, Canada	Egypt	United States	Germany	Brazil				o
70	Canada, Brazil	Canada, Brazil	United States	Philippines	Japan	Canada				o
90	India	US	Germany	Egypt	Japan	India				o
103, 113	Canada	New Zealand, US	Japan	Philippines	Uruguay	Canada				o
34	Turkey	India	New Zealand	United States	Egypt	Turkey				o
87, 110	Chile	EC	Philippines	Germany	Uruguay	Chile		o		
121	Argentina, EC	Argentina, EC	United States	New Zealand	Japan	Argentina				o
98	Korea, EC	Korea, EC	Egypt	Germany	Philippines	Korea	o			
108	US	EC	Uruguay	United States	Philippines	US				o
138	US	EC	Japan	Egypt	Uruguay	US				o

139, 142	Canada, Japan, EC	Canada, Japan, EC	Germany	United States	Philippines	Canada	o	o		
46	Brazil	Canada	Egypt	United States	Germany	Brazil				o
70	Brazil	Canada	Philippines	United States	Germany	Brazil				o
136, 162	EC, US, Japan	EC, US, Japan	Uruguay	Germany	Philippines	US	o	o		
170	Canada	US	Uruguay	United States	India	Canada		o		
161, 169	Korea	Australia, US	Germany	Egypt	Philippines	Korea				o
165	EC, US	EC, US	United States	Uruguay	Japan	US				
166	US, EC	US, EC	Uruguay	Egypt	Japan	US				o
141	EC	India	United States	Egypt	Philippines	EC				o
135	Canada, EC	Canada, EC	Philippines	United States	Germany	Canada	o	o		
122	Thailand	Poland	India	Uruguay	Japan	Thailand				o
177, 178	US, Australia, New Zealand	US, Australia, New Zealand	Germany	United States	India	US				
184	US, Japan	US, Japan	Japan	Philippines	Uruguay	US	o	o		
192	US	Pakistan	Egypt	Germany	India	US				o
58	Malaysia	US	United States	India	Uruguay	Malaysia		o		
132	Mexico	US	Philippines	Egypt	Germany	Mexico				o
108	US, EC	US, EC	Philippines	India	Japan	US				o
176	EC, US	EC, US	Germany	United States	Uruguay	US	o	o		



103, 113	Canada	New Zealand, US	Japan	Egypt	India	New Zealand, US			o	
202	US, Korea	US, Korea	Uruguay	United States	Egypt	US				
207	Chile	Argentina	India	United States	Australia	Chile				o
231	EC	Peru	Egypt	Egypt	Brazil	EC				o
213	US, EC	US, EC	Japan	India	Italy	US	o	o		
212	US	EC	Australia	Egypt	United States	US				o
103, 113	Canada	New Zealand, US	Brazil	Italy	Japan	Canada				o
217, 234	US	Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Korea, Mexico, Thailand	Italy	Brazil	Australia	US		o		
141	India	EC	Egypt	United States	Japan	EC			o	
219	Brazil	EC	India	Brazil	Italy	EC	o			
248, 249, 251, 252, 253, 254, 258, 259	US, China, EC, Japan, Korea, New Zealand, Norway, Switzerland	US, EC, Japan, Korea, New Zealand, Norway, Switzerland	United States	Egypt	Australia	US			o	o
245	Japan, US	Japan, US	Australia	Brazil	Italy	Japan				o
244	Japan	US	Japan	Egypt	India	Japan				o
257	US, Canada	US, Canada	Brazil	Australia	Italy	US				o

246	EC	India	Egypt	Brazil	Italy	EC				o
264	US, Canada	US, Canada	India	Brazil	United States	US				
276	US, Canada	US, Canada	Australia	Egypt	Japan	Canada				o
268	US, Argentina	Argentina, US	Japan	Egypt	India	US				o
267	US, Brazil	Brazil, US	United States	Brazil	India	US	o	o		
285	US, Antigua and Barbuda	US, Antigua and Barbuda	Italy	Egypt	Australia	US				o
302	Dominican Republic, Honduras	Honduras, Dominican Republic	Brazil	Australia	Italy	Dominican Republic				o
265, 266, 283	EC, Australia, Brazil, Thailand	Australia, Brazil, Thailand, EC	India	United States	Japan	EC				o
296	US, Korea	Korea, US	Egypt	United States	Japan	US				
269, 286	EC, Brazil, Thailand	Brazil, Thailand, EC	Italy	Brazil	India	EC	o	o		
282	Mexico, US	US, Mexico	India	Australia	Japan	US				o
295	Mexico	US	Australia	Egypt	Japan	Mexico				o
257	US	Canada	United States	Brazil	Italy	US				o
108	US, EC	EC, US	Egypt	India	United States	US				
308	Mexico	US	Japan	United States	Italy	Mexico		o		
277	Canada	US	Brazil	Egypt	India	Canada				o
294	EC, US	US, EC	Italy	United States	Japan	US	o	o		

264	Canada	US	Egypt	Brazil	Italy	US			o	
315	US, EC	EC, US	India	United States	Japan	EC				
322	Japan, US	US, Japan	Italy	Egypt	India	US				o
268	US, Argentina	Argentina, US	Japan	United States	South Africa	US				
207	Chile, Argentina	Argentina, Chile	Brazil	Egypt	Italy	Chile				o
336	Japan, Korea	Korea, Japan	South Africa	India	Italy	Japan				o
332	EC	Brazil	Egypt	Brazil	Japan	Brazil			o	
344	Mexico	US	India	Philippines	Italy	US			o	
267	US, Brazil	Brazil, US	Brazil	United States	South Africa	US	o	o		
345, 343	India, Thailand, US	US, India, Thailand	Italy	Brazil	India	US	o	o		
320, 321	EC, Canada, US	Canada, EC, US	South Africa	Egypt	Philippines	US, Canada				o
360	US, India	India, US	United States	Italy	China	US				
27	EC	Ecuador, US	Brazil	Japan	South Africa	EC				o
339, 340, 342	China	Canada; EC; US	Philippines	United States	Italy	China		o		
350	EC; US	US; EC	China	Brazil	South Africa	US				o
294	EC, US	US; EC	Japan	Philippines	United States	US				
322	US	Japan	Italy	Philippines	China	US				o
363	China, US	US, China	United States	Japan	Mexico	China	o	o		

367	Australia; New Zealand	New Zealand; Australia	China	United States	Japan	Australia				o
316	EU; US	US; EU	South Africa	Philippines	Belgium	EU				
379	China	US	Mexico	Philippines	Belgium	US			o	
371	Thailand	Philippines	Belgium	Mexico	China	Thailand				o
397	EU, China	China, EU	Japan	United States	South Africa	EU				o
353	EU, US	US, EU	Philippines	South Africa	China	US				o
399	China	US	United States	Japan	Belgium	China				
394, 395, 398	China, US, EU, Mexico	US, EU, Mexico, China	Mexico	United States	Japan	China	o	o		
396, 403	Philippines, EU	EU, US, Philippines	Belgium	United States	Mexico	Philippines	o	o		
406	US	Indonesia	Japan	Mexico	Belgium	US				o
381	US, Mexico	Mexico, US	China	India	United States	US				
384, 386	US, Canada, Mexico	Canada, Mexico, US	India	Mexico	Belgium	US	o	o		
414	China	US	South Africa	Belgium	China	China				o
412, 426	Canada	Japan, EU, Canada	Mexico	India	South Africa	Canada				o
400, 401	Canada, Norway, EU	EU, Canada, Norway	United States	Korea	China	EU			o	o
449	China, US	US, China	India	Korea	China	US	o	o		
431, 432, 433	US, China, EU	China, US, EU, Japan	Korea	Mexico	China	China				
436	India	United States, India	Mexico	India	United States	US	o	o		

437	China, US	China	Belgium	India	Korea	US			o	o
438, 444, 445	Argentina, EU, Japan	EU, US, Japan, Argentina	Korea	India	Mexico	Argentina				o
429	Viet Nam	United States	United States	India	Belgium	Viet Nam		o		
384, 386	US, Canada, Mexico	Canada, Mexico, US	Mexico	Korea	Belgium	US	o	o		
430	India	US	China	Korea	Mauritius	India				o
457	Peru, Guatemala	Peru	India	United States	China	Peru	o		o	
454, 460	Japan (in DS454); China (in DS 460), EU	China (in DS454 and DS460)	Belgium	United States	Mexico	China	o	o		
381	US, Mexico	Mexico, US	Mauritius	India	China	US			o	o
397	EU, Other Appellant : China	China, EU	Mexico	United States	Mauritius	EU				o
453	Panama, Other Appellant : Argentina	Argentina, Panama	Korea	India	China	Argentina				o
461	Colombia	Panama	China	Mauritius	Belgium	Colombia				
464	US	Korea	United States	India	Mexico	US		o		
456	India	US	Belgium	Korea	United States	India		o		
473	EU, Argentina	Argentina, EU	India	Belgium	China	EU				
475	Russian Federation, EU	EU, Russian Federation	Mauritius	Mexico	Belgium	Russia	o	o		
471	China	US	India	Mexico	Mauritius	US			o	

SUM	25	33	15	64
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## **Annex 2. Trade Remedy Cases**<sup>102</sup>

Dispute Number	Agreements addressed	Member 1	Member 2	Member 3
DS 22	SCM	El-Naggar	Ehlermann	Lacarte-Muró
DS 60	Anti-dumping	Lacarte-Muró	Beeby	El-Naggar
DS 46	SCM	El-Naggar	Bacchus	Ehlermann
DS 70	SCM	Bacchus	Feliciano	Matsushita
DS 121	Safeguards	Bacchus	Beeby	Matsushita
DS 98	Safeguards	El-Naggar	Ehlermann	Feliciano
DS 108	SCM	Lacarte-Muró	Bacchus	Feliciano
DS 138	Anti-dumping & SCM	Matsushita	El-Naggar	Lacarte-Muró
DS 139, 142	SCM	Ehlermann	Bacchus	Feliciano
DS 46	SCM	El-Naggar	Bacchus	Ehlermann
DS 70	SCM	Feliciano	Bacchus	Ehlermann
DS 136, 162	Anti-dumping	Lacarte-Muró	Ehlermann	Feliciano
DS 166	Safeguards	Lacarte-Muró	Abi-Saab	Taniguchi
DS 141	Anti-dumping	Bacchus	Abi-Saab	Feliciano
DS 122	Anti-dumping	Ganesan	Lacarte-Muró	Taniguchi
DS 177, 178	Safeguards	Ehlermann	Bacchus	Ganesan
DS 184	Anti-dumping	Taniguchi	Feliciano	Lacarte-Muró
DS 132	Anti-dumping	Feliciano	Abi-Saab	Ehlermann
DS 108	SCM	Feliciano	Ganesan	Taniguchi
DS 103, 113	SCM	Taniguchi	Abi-Saab	Ganesan
DS 202	Safeguards	Lacarte-Muró	Bacchus	Abi-Saab
DS 213	SCM	Taniguchi	Ganesan	Sacerdoti
DS 212	SCM	Lockhart	Abi-Saab	Bacchus
DS 217, 234	Anti-dumping & SCM	Sacerdoti	Baptista	Lockhart
DS 141	Anti-dumping	Abi-Saab	Bacchus	Taniguchi

<sup>102</sup> Cases that were served by trade-remedy experts are colored in grey and experts' names are highlighted with boldface.

DS 219	Anti-dumping	Ganesan	Baptista	Sacerdoti
DS 248, 249, 251, 252, 253, 254, 258, 259	Safeguards	Bacchus	Abi-Saab	Lockhart
DS 244	Anti-dumping	Taniguchi	Abi-Saab	Ganesan
DS 257	SCM	Baptista	Lockhart	Sacerdoti
DS 264	Anti-dumping	Ganesan	Baptista	Janow
DS 268	Anti-dumping	Taniguchi	Abi-Saab	Ganesan
DS 267	SCM	Janow	Baptista	Ganesan
DS 265, 266, 283	SCM	Ganesan	Janow	Taniguchi
DS 296	SCM	Abi-Saab	Janow	Taniguchi
DS 282	Anti-dumping	Ganesan	Lockhart	Taniguchi
DS 295	Anti-dumping & SCM	Lockhart	Abi-Saab	Taniguchi
DS 108	SCM	Abi-Saab	Ganesan	Janow
DS 277	Anti-dumping & SCM	Baptista	Abi-Saab	Ganesan
DS 294	Anti-dumping	Sacerdoti	Janow	Taniguchi
DS 264	Anti-dumping	Abi-Saab	Baptista	Sacerdoti
DS 322	Anti-dumping	Sacerdoti	Abi-Saab	Ganesan
DS 268	Anti-dumping	Taniguchi	Janow	<b>Unterhalter</b>
DS 336	SCM	<b>Unterhalter</b>	Ganesan	Sacerdoti
DS 344	Anti-dumping	Ganesan	Bautista	Sacerdoti
DS 267	SCM	Baptista	<b>Hillman</b>	<b>Unterhalter</b>
DS 345, 343	Anti-dumpng	Sacerdoti	Baptista	Ganesan
DS 350	Anti-dumping	Zhang	Baptista	<b>Unterhalter</b>
DS 294	Anti-dumping	Oshima	Bautista	<b>Hillman</b>
DS 322	Anti-dumping	Sacerdoti	Bautista	Zhang
DS 316	SCM	<b>Unterhalter</b>	Bautista	Van den Bossche
DS 379	SCM	Ramírez-Hernández	Bautista	Van den Bossche
DS 371	Anti-dumping	Van den Bossche	Ramírez-Hernández	Zhang
DS 397	Anti-dumping	Oshima	<b>Hillman</b>	<b>Unterhalter</b>
DS 353	SCM	Bautista	<b>Unterhalter</b>	Zhang
DS 414	Anti-dumping & SCM	<b>Unterhalter</b>	Van den Bossche	Zhang
DS 412, 426	SCM	Ramírez-Hernández	Bhatia	<b>Unterhalter</b>
DS 449	SCM	Bhatia	Chang	Zhang
DS 436,	SCM	Ramírez-Hernández	Bhatia	<b>Graham</b>

DS 437	SCM	Van den Bossche	Bhatia	Chang
DS 429	Anti-dumping	<b>Graham</b>	Bhatia	Van den Bossche
DS 454, 460	Anti-dumping	Van den Bossche	<b>Graham</b>	Ramírez-Hernández
DS 397	Anti-dumping	Ramírez-Hernández	<b>Graham</b>	Servansing
DS 461	Anti-dumping & SCM	Zhang	Servansing	Van den Bossche
DS 473	Anti-dumping	Bhatia	Van den Bossche	Zhang
DS 471	Anti-dumping	Bhatia	Ramírez-Hernández	Servansing



## 국문 초록

### WTO 상소기구 운영 평가: 상소 위원 구성을 중심으로

이하경

1995년 출범 이후 세계무역기구(WTO)의 상소기구는 500여 건이 넘는 무역 분쟁을 다룸으로써 그 중요성을 증명해왔다. 상소기구가 세계 무역에서 가지고 있는 의의가 심화됨에 따라 그 운영을 평가하는 선행 연구들이 존재했다. 하지만 본 연구는 그 운영방식이 WTO 상소기구 운영을 관할하고 있는 분쟁해결양해(Understanding on Rules and Procedures Governing the Settlement of Disputes)와 상소기구를 위한 작업절차(Working Procedures for Appellate Review)와 같은 규정을 준수하고 있는지에 초점을 맞추고 있다. 그 중에서도 상소 기구를 이루고 있는 주체인 상소기구 위원 구성에 있어 상소기구가 공정성과 전문성을 가지고 있는지에 대해 평가하고자 한다.

본 연구는 세 가지 기준에 따라 상소기구 위원 구성의 공정성과 전문성을 평가했다. 공정성을 판단하기 위해 첫째로 상소기구 구성이 WTO

회원국을 대변할 수 있는 대표성을 띠고 있는지 확인해보았다. 둘째로 국적국가 출신의 상소기구 위원이 분쟁해결 과정에 참여할 수 있다는 점을 고려하여 이러한 사실이 국적국가에 유리하게 작용하는지 알아보았다. 마지막으로 전문성을 평가하기 위해 전체 분쟁의 50%를 구성하는 무역 구제 분쟁에 대하여 상소기구 위원들이 얼마나 전문성을 가지고 있는지 검토했다.

그 결과 상소기구 위원 구성에 있어 문제점이 발견되었다. 역대 상소기구 위원들은 WTO 회원국 전체를 대변할 수 있다고 생각될 만큼 다양한 국가에서 선발되지 않았다. 또한 27명의 역대 상소기구 위원 중 3명의 위원만이 무역 구제 분쟁에 전문성을 갖추고 있었다. 하지만 국적국가 출신의 위원이 있다고 해도 그 판결에 있어서 국적국가의 유리함은 발견되지 않았다.

주제어: 세계무역기구 상소 기구, 상소기구 위원 구성, 분쟁해결양해, 전문성

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